

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1592**

In the Matter of:
Petition of MCEA for Commencement of
an Environmental Assessment Worksheet.

**Filed October 4, 2021
Reversed and remanded
Smith, Tracy M., Judge**

Renville County Board of Commissioners

Elise L. Larson, Jay E. Eidsness, Stephanie L. Fitzgerald (pro hac vice), Minnesota Center for Environmental Advocacy, St. Paul, Minnesota (for relators Minnesota Center for Environmental Advocacy and Protecting Public Waters)

David J. Torgelson, Renville County Attorney, Olivia, Minnesota; and

Gerald W. VonKorff, Rinke Noonan, Ltd., St. Cloud, Minnesota (for respondent Renville County Board of Commissioners)

Jeff C. Braegelmann, Dean M. Zimmerli, Gislason & Hunter LLP, New Ulm, Minnesota (for respondents Fagen Farms, LLP; Peterson Family Farms Ltd. of Sacred Heart; Edward E. Werre Trust B; Paul Lanning; Liz Lanning; Aaron Pape; Delores J. Larsen; Werre Family Partnership No. 1; Alice A. Zimmer, Revocable Trust; Leslie R. Zimmer, Revocable Trust (together Project Proposers))

Karuna Ojanen, Ojanen Law Office, Rochester, Minnesota (for amici curiae Clean Up the River Environment, Coalition for a Clean Minnesota River, Friends of the Minnesota Valley, Izaak Walton League, Lake Pepin Legacy Alliance, Minnesota Conservation Federation, and Sever Peterson)

Considered and decided by Larkin, Presiding Judge; Hooten, Judge; and Smith,
Tracy M., Judge.

SYLLABUS

For purposes of evaluating whether a mandatory environmental assessment worksheet must be prepared under Minn. R. 4410.4300, subp. 27 (2019), the absence of a

water from the Minnesota Department of Natural Resources’ public waters inventory under Minn. Stat. § 103G.201 (2020) does not dictate that the water is not a “public water” as defined by Minn. Stat. § 103G.005, subd. 15(a)(9) (2020).

OPINION

SMITH, TRACY M., Judge

In this certiorari appeal, relators challenge the decision of respondent Renville County Board of Commissioners not to prepare an environmental assessment worksheet (EAW) for a proposed ditch-improvement project known as the County Ditch 77 Project (CD 77 project). Relators the Minnesota Center for Environmental Advocacy (MCEA) and Protecting Public Waters argue that the county erred by deciding that neither a mandatory nor a discretionary EAW is required.

Relators assert that an EAW is mandatory for the CD 77 project under the Minnesota Environmental Policy Act (MEPA) and its regulations due to the impact the project will have on “public waters”—specifically, the upper reach of Limbo Creek in Renville County. Relators argue that the county erroneously concluded that this portion of Limbo Creek is not a public water because it was not listed on the public waters inventory (PWI) maintained by the Minnesota Department of Natural Resources (DNR).

Alternatively, relators argue that, even if the upper reach of Limbo Creek is not a public water and an EAW is not mandatory, the county must prepare a discretionary EAW under MEPA regulations because the project has the potential for significant environmental effects. Relators assert that the county’s decision not to prepare a discretionary EAW is based on legal error because the county evaluated historical rather than existing conditions

and because the decision is otherwise unsupported by substantial evidence and is arbitrary or capricious.

We conclude that the county erred by deciding that, because the upper reach of Limbo Creek does not appear on the DNR's PWI list, it is not a public water. We further conclude that, when the proper definition of "public waters" is applied, there is not substantial evidence in the record supporting respondents' contention that the upper portion of Limbo Creek is not a public water. Finally, we conclude that the record lacks substantial evidence to support respondents' other contention that, even if the upper portion of Limbo Creek is a public water, a mandatory EAW is not required based on other regulatory provisions. We therefore reverse and remand for the county to prepare a mandatory EAW.¹

FACTS

In 2016, respondent landowners filed a drainage petition with the Renville County Board of Commissioners, which sits as the county's drainage authority under Minnesota's drainage code,² to improve CD 77's drainage system. CD 77 is a ditch that, for a century, has served farms in Renville County. The proposed CD 77 project would extend the drainage system downstream and remove sediment from the existing CD 77 outlet. The proposed system would drain into the upper portion of Limbo Creek. Limbo Creek is a watercourse with a watershed comprising 9,335 acres, or over 14 square miles, in Renville County.

¹ Because we conclude that a mandatory EAW is required, we do not address whether the county erred by rejecting MCEA's petition for a discretionary EAW.

² Minn. Stat. §§ 103E.005-.812 (2020)

In May 2017, an engineering firm appointed by the county submitted its preliminary engineering report for the CD 77 project. In June 2017, the DNR issued preliminary comments to the county, stating that the proposed project does not affect “public waters.” The DNR explained that the upper portion of Limbo Creek, where the proposed work would take place, is not a public water.

Significantly for this appeal, at that time, and at the time of the challenged decision in this case, the upper reach of Limbo Creek did not appear on the DNR’s PWI list. The PWI is an inventory of each county’s public waters that is compiled and maintained by the DNR. Minn. Stat. § 103G.201. In addition to a list of public waters, the DNR must maintain a PWI map indicating which waters are public waters. *Id.* (a); *see also* 1979 Minn. Laws ch. 199, § 7, at 336-37 (establishing and setting procedures for developing the PWI). The upper reach of Limbo Creek did not appear on the PWI list but did appear on the PWI map as a heavy dashed line. The heavy dashed line on the PWI map was a combination of two symbols—a heavy dark line for public waters and a dashed line for public ditches. Around 2017, the DNR noticed that watercourses with the dual designation of a heavy dashed line on the PWI map had not been included in the process for identifying public waters for the PWI and undertook a process to address those watercourses.³

In March 2019, the MCEA petitioned the DNR to include the upper reach of Limbo Creek as a public water on the PWI list. In June 2019, the DNR requested that the county

³ We discussed the issue regarding watercourses marked by heavy dashed lines on the PWI map and the DNR’s process to address those watercourses in our unpublished decision in *In re Improper Inclusion of Certain Water Courses within Public Waters Inventory Maps for 71 Counties*, A17-0904, 2018 WL 1902441, at *1 (Minn. App. Apr. 23, 2018).

“not make any Order to Repair or construct the CD #77 outlet extension into waters covered by the petition” while it evaluated the MCEA petition. In August 2019, the DNR submitted an update to the county about the addition of Limbo Creek to the PWI list. The DNR explained that it intended to start a notice-and-comment period on adding the upper reach of Limbo Creek to the PWI list.

Before the notice-and-comment period began, the engineering firm issued the final engineer’s report, concluding that the proposed CD 77 project would not affect public waters. In September 2020, soon after the report was issued, the DNR sent another letter to the county stating that the upper reach of Limbo Creek *is* a public water and that it was in the process of being added to the PWI list. The DNR explained that the upper reach of Limbo Creek should not have been identified as a public ditch and that “the watercourse did meet criteria for inclusion as a Public Watercourse at the time of the original PWI and still meets those criteria today.”

In October 2020, the MCEA filed a petition with the county requesting a mandatory EAW because the DNR was redesignating the upper portion of Limbo Creek as a public water on the PWI or, alternatively, a discretionary EAW because the project may have significant environmental effects. To evaluate the MCEA petition, the Minnesota Environmental Quality Board (EQB) designated the county as the “responsible government unit” charged with environmental review under MEPA. *See* Minn. R. 4410.0200, subp. 75 (2019). The EQB directed the county to determine the need for an EAW by assessing whether an EAW was mandatory under Minn. R. 4410.4300 or whether there may be the

potential for significant environmental effects, requiring a discretionary EAW under Minn. R. 4410.4500 (2019).

On October 27, 2020, the county held a hearing on the petition for an EAW and the final engineer's report and then scheduled a final hearing for November 3, 2020. On November 2, 2020, the DNR submitted a letter to the county repeating its determination that, although "a portion of Limbo Creek is not currently listed on the Public Waters Inventory, it is still regulated as a public water because it meets the statutory definition of such waters." The DNR stated that "[it] has compared the [CD 77] project to the[] mandatory EAW thresholds and determined that the project, as proposed, exceeds the mandatory EAW threshold under subpart 27 for projects that will change the course, current, or cross-section of one acre or more of any public water."

On November 3, 2020, the county held its final hearing and issued its decision. The county denied the MCEA petition for a mandatory EAW because, it determined, the upper reach of Limbo Creek is not a public water, and it denied the petition for a discretionary EAW because, it determined, the project does not have the potential for significant environmental effects.

This appeal follows.

ISSUE

Was the county's decision not to prepare a mandatory EAW affected by an error of law or unsupported by substantial evidence?

ANALYSIS

An appellate court may reverse, remand, or modify an agency's decision if it reflects an error of law, the findings are arbitrary or capricious, or the findings are unsupported by substantial evidence. Minn. Stat. § 14.69 (2020); *see also Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006) (applying standards of section 14.69 to county decision that environmental impact statement was not necessary). “[D]ecisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies’ expertise and their special knowledge in the field[s] of their technical training, education, and experience.” *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977). A reviewing court’s role is to determine whether the agency has taken a “hard look” at the problems involved, and whether the agency “genuinely engaged in reasoned decision-making.” *Id.* at 825 (quotations and citation omitted). We review legal issues de novo. *Fish v. Comm’r of Minn. Dep’t of Hum. Servs.*, 748 N.W.2d 360, 363 (Minn. App. 2008). We defer to an agency’s factual findings, provided the findings are supported by substantial evidence. *Saif Food Mkt. v. Comm’r of Dep’t of Health*, 664 N.W.2d 428, 430 (Minn. App. 2003).

A decision is based on substantial evidence if “the agency has adequately explained how it derived its conclusion” and “that conclusion is reasonable on the basis of the record.” *In re NorthMet Project Permit to Mine Application Dated Dec. 2017*, 959 N.W.2d 731, 749 (Minn. 2021) (quotations omitted) (*NorthMet Project*). “An agency’s decision is arbitrary or capricious if it represents the agency’s will and not its judgment.” *In re Rev. of 2005 Ann. Automatic Adjustment of Charges for All Elec. & Gas Utils.*, 768 N.W.2d 112,

118 (Minn. 2009). If an agency engages in reasoned decision-making, we will affirm the agency’s decision, even if we may have reached a different result. *See Cable Commc’ns Bd. v. Nor-west Cable Commc’ns P’ship*, 356 N.W.2d 658, 669 (Minn. 1984).

MEPA provides for two types of environmental review of proposed actions—an EAW and an environmental impact statement. Minn. Stat. § 116D.04, subds. 1a(c), 2a(a) (2020). An EAW is a “brief document which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required for a proposed action.” *Id.*, subd. 1a(c). There are several kinds of proposed actions for which an EAW is mandatory. Relevant here, an EAW is mandatory when the proposed action will “change or diminish the course, current, or cross-section of one acre or more of any public water.” Minn. R. 4410.4300, subp. 27(A).

The county determined that an EAW is not mandatory for the proposed CD 77 project because the affected area of Limbo Creek is not a public water. The county explained that “[o]nly the lower portion of Limbo Creek is listed on the official public waters inventory list.”

Relators argue that the county’s reliance on the absence of the upper reach of Limbo Creek from the PWI list is misplaced because MEPA’s definition of “public waters” is not limited to waters on the PWI and the county must defer to the DNR’s ultimate and repeated determination that the upper reach *is* a public water. Relators further argue that there is no factual dispute that the upper reach meets the statutory definition of “public waters.” Respondents, on the other hand, contend that the exclusion of the upper reach from the PWI list is dispositive and suggest that, in any event, the county properly found that the

upper reach does not meet the statutory definition of a public water. Respondents further argue that, even if the upper reach is a public water, the requirements for a mandatory EAW are not met because the CD 77 project will not affect the course, current, or cross-section of Limbo Creek and an exception to the rule applies.⁴

Public Waters

As noted above, under MEPA regulations, an EAW is mandatory when the proposed action will “change or diminish the course, current, or cross-section of one acre or more of any *public water*.” Minn. R. 4410.4300, subp. 27(A) (emphasis added). “Public waters” under MEPA regulations “has the meaning given in Minnesota Statutes, section 103G.005.” Minn. R. 4410.0200, subp. 69 (2019). Relevant here, the statutory definition of “public waters” includes “natural and altered watercourses with a total drainage area greater than two square miles.” Minn. Stat. § 103G.005, subd. 15(a)(9).

Whether “public waters” under MEPA excludes waters not listed on the PWI is a question of interpretation of statute and rules. The interpretation of rules and statutes generally follows the same analysis and is subject to de novo review. *See In re Reissuance of an NPDES/SDS Permit to U.S. Steel Corp.*, 954 N.W.2d 572, 576 (Minn. 2021). When the language of a statute or rule is plain and unambiguous, we follow that plain language. *See id.*

⁴ Both the county and the project proposers filed briefs in this appeal. Although they do not make all of the same arguments, for simplicity’s sake we refer to respondents together when characterizing those arguments.

The definition of “public waters” under MEPA is plain and unambiguous. Nothing in the statutory definition makes qualifying as a “public water” dependent on a water’s inclusion on the DNR’s PWI list or map. *See* Minn. Stat. § 103G.005, subd. 15(a) (2020). We may not add terms that a statute or rule does not include. *See NorthMet Project*, 959 N.W.2d at 744. Moreover, when the legislature has decided to define “public waters” with reference to the PWI, it has done so explicitly. In Minnesota Statutes section 103F.48, subdivision 1(i) (2020), for example, the legislature defined “public waters” as those “public waters that are on the public waters inventory as provided in section 103G.201.” Unlike section 103F.48, section 103G.005 does not define “public waters” in relation to the PWI.

Thus, when a responsible governmental unit is determining whether to order a mandatory EAW for a project that might affect “public waters,” the plain language of the statutory definition applies and the absence of a water from the PWI is not conclusive. Though respondents make policy arguments against such an interpretation, “[w]hen the language of a statute is clear, [appellate courts] apply the plain language of the statute and decline to explore its spirit or purpose.” *Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016). Because the statutory definition of “public waters” is clear, we conclude that the county committed legal error by deciding that the upper reach of Limbo Creek is not a public water because it was not included on the PWI list.

We further conclude that there is no basis to remand for the county to apply the correct statutory definition because, on this record, there is not substantial evidence that the upper reach of Limbo Creek is not a public water. Respondents suggest on appeal that

the county found that the upper reach of Limbo Creek does not meet the statutory definition of public waters because of its physical properties and history. But the county made no such finding. The county found that the upper portion had “historically been straightened” and that the PWI map contains dashed lines in that reach, indicating a “public ditch.” But neither of those findings is determinative of whether the upper reach is a “natural or altered watercourse[] with a total drainage area greater than two square miles.” Minn. Stat. § 103G.005, subd. 15(a)(9).

Respondents’ argument that the upper reach is not a public water under the statutory definition is not supported by substantial evidence in the record. Respondents do not assert that Limbo Creek’s total drainage area is less than two square miles. Rather, they contend that Limbo Creek is an “artificial watercourse” dredged and channeled by farmers in 1918 to connect wetlands and therefore not a “natural” or “altered watercourse” for purposes of the statutory definition of “public waters.” But the record includes photographic evidence from 1938 depicting Limbo Creek meandering through Renville County and evidence from the county that Limbo Creek is a natural watercourse. In addition, the engineer engaged by the county described Limbo Creek as both an “unaltered” and “altered natural watercourse,” and the county adopted the Renville County comprehensive local water management plan, which described Limbo Creek as a “natural waterway[.]” Respondents do not identify substantial support in the record for their argument that Limbo Creek is an artificial watercourse consisting of a “chain of wetlands through which water flows, one to another, without a defined channel and banks.”

Crucially, the record also contains repeated declarations from the DNR that the upper portion of Limbo Creek *is* a public water. Although the DNR initially took a different position in its preliminary comments in 2017, throughout the remainder of the proposed-CD 77 process, the DNR repeatedly advised the county of its determination that the upper reach of Limbo Creek is a public water. In June 2019, the DNR notified the county that it had received a petition from the MCEA to add the upper reach of Limbo Creek to the PWI and that it intended to evaluate this petition. The DNR requested that, while it evaluated the petition, the county not take any action on the CD 77 project. The DNR explained that the change in position was part of a larger process of reexamining and correcting errors in the PWI. It explained that

errors were discovered that may have resulted in landowners failing to receive proper notice. To correct this error, the 2017 Commissioner’s Order removed a host of watercourses from the PWI with the understanding that at a later date, some watercourses could be added back to the PWI, subject to the requisite public comment opportunity. Limbo Creek is such a watercourse. Accordingly, DNR intends to initiate a public notice and comment period in the near future to determine whether Limbo Creek—along with a host of other watercourses—should be re-added to the PWI.

In September 2020, the DNR sent the county its response to the final engineer’s report. That response said that “[t]he reach of Limbo Creek included in this proposed project is currently in the process of being added to the MNDNR Public Water Inventory.”

The DNR also explained why Limbo Creek specifically was absent from the PWI list:

At the time of the original PWI, the Renville County Board asserted that Limbo Creek was under petition to become Renville County Ditch 145 and would be regulated by the Drainage Authority. The proposed designation of Limbo Creek

as Renville County Ditch 145 failed in the early 1980s. As such, Limbo Creek is not a public ditch but was not listed on the Renville County PWI.

The DNR further stated, “However, the watercourse did meet criteria for inclusion as a Public Watercourse at the time of the original PWI and still meets those criteria today. As such, this project is subject to and must comply with Minn. Statute §103G.245.”⁵

Finally, on November 2, 2020, the DNR advised the county:

Public waters are defined in Minn. Stat. § 103G.005 Subd. 15 and Limbo Creek meets this definition under, ‘(9) natural and altered watercourses with a total drainage area greater than two square miles.’ While a portion of Limbo Creek is not currently listed on the Public Waters Inventory, it is still regulated as a public water because it meets the statutory definition of such waters.⁶

The DNR’s repeated declaration that the upper reach is in fact a public water is fully supported by the record evidence and was unreasonably disregarded by the county. On this record, the county’s determination that the upper reach of Limbo Creek is not a public water is not supported by substantial evidence. *Cf. Trout Unlimited v. Minn. Dep’t of Agric.*, 528 N.W.2d 903, 908-09 (Minn. App. 1995) (reversing a responsible governmental unit’s decision not to order an environmental impact statement despite record of “grave”

⁵ Minn. Stat. § 103G.245 (2020) governs work in public waters.

⁶ Respondents argue that the county properly disregarded the DNR’s November 2, 2020 letter because it was submitted after the county’s first hearing, while relators argue that the county erred by not considering it. We need not resolve this dispute because the November 2 letter, which is in the record, only reaffirms DNR’s previous communication to the county that the upper reach of Limbo Creek is a public water.

environmental concerns expressed by multiple state agencies), *rev. denied* (Minn. Apr. 27, 1995).⁷

Course, Current, or Cross-Section

Respondents argue next that, even if the upper portion of Limbo Creek is a public water, the proposed CD 77 project still does not call for a mandatory EAW because it will not “change or diminish the course, current, or cross-section” of Limbo Creek as required by Minn. R. 4410.4300, subp. 27(A), before an EAW is mandated. Respondents contend, based on historical conditions, that the CD 77 project will not affect those three features of Limbo Creek. They assert that any changes will simply restore CD 77 to its “historic function” and return it to the “same hydraulic capacity as originally constructed.”

However, the county’s decision rejecting a mandatory EAW was not based on a determination that the project would not change or diminish the course, current, or cross-section of the upper reach of Limbo Creek. The decision does not address the course, current, or cross-section of Limbo Creek or changes to any of those features. In any event, we disagree with respondents’ argument that restoration of previous conditions related to a century-old ditch means that a mandatory EAW is not required. The rule requires an EAW for projects “that *will* change or diminish course, current, or cross-section of one acre

⁷ Because we conclude that the statutory definition of “public waters” does not depend on a water’s inclusion on or exclusion from the PWI list, and because the record supports only the conclusion that the upper reach of Limbo Creek is a public water, we need not address respondents’ arguments with respect to the res judicata effect of a 1985 district court order including the lower, but not the upper, reach of Limbo Creek on the PWI list or the DNR’s authority to change the PWI.

or more of any public water.” Minn. R. 4410.4300, subp. 27(A) (emphasis added). There is nothing in that language that suggests that the change be measured from historical rather than current conditions, as respondents contend. The record establishes, and respondents do not dispute, that the proposed project will change or diminish the current conditions of Limbo Creek.

Exception to Mandatory EAW

Finally, respondents argue that the proposed project falls within an exception to the mandatory EAW rule. Under Minn. R. 4410.4300, subp. 27(A), an EAW must be prepared “[f]or projects that will change or diminish the course, current, or cross-section of one acre or more of any public water or public waters wetland *except for those to be drained without a permit according to Minnesota Statutes, chapter 103G.*” (Emphasis added.) Respondents contend that, because the CD 77 project “could be completed without a permit,” an EAW is not mandatory. But the county’s order denying a mandatory EAW is not based on the determination that the project could be completed without a permit. In any event, respondents’ exception argument is ultimately premised on the proposition that the county is exercising its authority under the drainage code over a project that does not involve a “public water.” *See* Minn. Stat. § 103E.011 (2020). But, again, this record establishes that the upper reach of Limbo Creek *is* a public water, and the state agency responsible for the permitting decision in this case—the DNR—has informed the county several times that a permit *is* required. Respondents’ contention that an exception to the EAW applies is not supported by the record.

DECISION

In determining whether to prepare a mandatory EAW for the CD 77 project, the county erred by concluding that the absence of the upper reach of Limbo Creek from the PWI list conclusively establishes that it is not a public water. Moreover, the record lacks substantial evidence to support any determination that the upper reach of Limbo Creek is not a public water, that the project's effect on Limbo Creek does not require a mandatory EAW, or that an exception to the mandatory EAW requirement applies. We thus reverse the county's decision and remand for the county to prepare an EAW.

Reversed and remanded.